

**STATE'S MOTION IN LIMINE RE: INTRODUCTION OF DEFENDANT'S OTHER ACTS TO PROVE MOTIVE, INTENT AND KNOWLEDGE PURSUANT TO RULE 404(B), ARIZONA RULES OF EVIDENCE**

The defendant's prior DUI conviction was relevant to prove that the defendant acted recklessly. Other acts evidence under Rule 404(b), Ariz. R. Evid., requires the State to prove the defendant committed the other act by clear and convincing evidence.

The State of Arizona, by and through undersigned counsel, requests this court to grant the State's Motion in Limine to introduce evidence of the defendant's other acts, pursuant to Rule 404(b) Arizona Rules of Evidence, and for the reasons set forth in the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**FACTS:**

On March 11, 1996, approximately 09:10 p.m., defendant Jose Valenzuela was driving westbound on Northern Avenue at 35th Avenue. He attempted to turn left and he collided with a vehicle driven by Mr. Delbert Shaffer. The three victims, all of whom were passengers in the defendant's vehicle, were seriously injured in the collision. Leticia Valenzuela died from blunt force traumatic injuries. Gilbert Valenzuela suffered a large laceration to his forehead and possibly received internal injuries. Juan Medina was treated for a fractured clavicle and four fractured ribs. Urine and blood samples were taken from the defendant at the hospital. The results of tests indicated that the defendant had a BAC of .050.

The State now seeks to introduce evidence of the defendant's prior DUI convictions.

**LAW:**

## GENERAL PRINCIPLES OF LAW

As a general rule in criminal cases, the State may not offer evidence of other unrelated criminal acts of the accused when the evidence is only probative of the fact that someone who has once violated the law is more likely to do so again. Evidence of another criminal act, however, will be admitted if it directly establishes some essential element of the crime charged, or has independent relevance for some purpose other than showing that the accused committed the crime in question because he has a criminal character. Rule 404(b), Arizona Rules of Evidence, provides:

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

[Emphasis added.]

Therefore, under Rule 404(b), Ariz. R. Evid., other acts evidence is only excluded when these acts of prior misconduct are proffered solely to prove the character of the person accused. If other acts are relevant and offered for admission in order to advance a "noncharacter" theory, then this evidence must be deemed admissible. *State v. Via*, 146 Ariz. 108, 121, 704 P.2d 238, 251 (1985).

In Arizona, the other acts evidence may be admitted when there is "clear and convincing evidence" that the other act was committed and that the defendant committed the act. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997). Accordingly, the State must show that there is "clear and convincing evidence" to support a jury finding that the defendant committed the other offenses.

**THE DEFENDANT'S OTHER ACTS ARE ADMISSIBLE TO PROVE THE DEFENDANT'S RECKLESS INDIFFERENCE TO THE PROBABLE CONSEQUENCES OF HIS ACTIONS.**

The State seeks to admit the defendant's prior act of driving under the influence of alcohol to show that the defendant was cognizant of the recklessness and risk to others by driving while intoxicated.

In *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984), the defendant was convicted of second degree murder arising out of an automobile collision in which the defendant's blood alcohol content was .315 percent. The trial court admitted evidence of the defendant's driving record showing the defendant's previous DUI convictions. In holding that the trial court did not err in admitting this evidence the Fourth Circuit Court of Appeals held that:

Defendant contends that the district court erred in admitting into evidence defendant's driving record which showed previous convictions for driving while intoxicated. The driving record would not have been admissible to show that defendant had a propensity to drive while drunk. Fed. R. Evid. 404(b). However, **the driving record was relevant to establish that defendant had grounds to be aware of the risk his drinking and driving while intoxicated presented to others.** It thus was properly admitted.

739 F.2d at 949 [emphasis added].

The reasoning enunciated in *Fleming* was adopted by the Arizona Court of Appeals in *State v. Woody*, 173 Ariz. 561, 845 P.2d 487 (App. 1992). In *Woody*, the defendant was driving on the wrong side of the road on December 23, 1989, traveling in excess of 60 m.p.h. with a BAC of .20, when he crashed into the victim's vehicle head on. At trial the court permitted the introduction of the defendant's prior 1985 DUI conviction, in which he was stopped for speeding. The defendant was found guilty of

manslaughter. On appeal the court cited with approval the language from *United States v. Fleming, supra*. The Court of Appeals further noted:

In this case, the facts of appellant's prior conviction were sufficiently similar for the jurors reasonably to conclude that as a result of it, appellant was made aware of the risks he posed to others in driving while under the influence. Thus, the evidence was relevant to the issue of whether appellant's mental state reflected a reckless indifference to human life.

*Id.* at 563, 845 P.2d at 489.

Under the rationale established in *Fleming* and *Woody*, the State seeks to introduce into evidence the defendant's prior DUI convictions. It was clear to the defendant after his prior DUI convictions that he was reckless when he drove while intoxicated. Nevertheless, the defendant persisted in this reckless conduct, in dangerous disregard of the laws of Arizona. A person acts "recklessly," as defined in A.R.S. §13-105(9)(c), when the person "a person is aware of and consciously disregards a substantial and unjustifiable risk."

In summary, the defendant was put on notice through his prior convictions that alcohol consumption causes him to exercise poor judgment and affects his driving. It is not the State's intention to put the defendant's character in question. Rather, the specific prior acts alleged by the State show that the defendant had more than adequate warning and notice that his conduct was reckless and presented an unwarranted risk to the community.

#### **CONCLUSION:**

The defendant's prior convictions for DUI were sufficient to make him aware that when he drives while intoxicated, his judgment is impaired and he is dangerous to

others. The State therefore asks this Court to grant the State's Motion in Limine and allow the State to present evidence of those prior convictions.